

STATE OF MICHIGAN
COURT OF APPEALS

JENNIFER L. HEINZ, Individually and as
Personal Representative of the Estate of RANDY
HEINZ, Deceased,

Plaintiff-Appellant,

v

PENINSULA CONSTRUCTION & SUPPLY,
INC.,

Defendant-Appellee.

UNPUBLISHED
April 29, 2003

No. 238213
Grand Traverse Circuit Court
LC No. 01-021366-NO

Before: Kelly, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent.

I cannot agree that the evidence on the question whether defendant (PCSI) was decedent's employer was "susceptible of but a single inference," as it must be for the question to be decided as a matter of law. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 693-694; 594 NW2d 447 (1999). The evidence bearing on PCSI's status *is* disputed and conflicting inferences may reasonably be drawn from the known facts, thus this issue was for a jury. *Id.*

Plaintiff presented evidence that decedent's employer, Chaney Creek Construction, is a construction company separate and independent from PCSI, with construction projects of its own. The record is clear that Chaney Creek is not in the business of labor brokering, and that it is not an affiliate or a subsidiary of PCSI.

Regarding the first factor of the economic realities test, control of decedent's duties, the circuit court concluded:

It is undisputed that Chaney maintained some control over the decedent—Chaney assigned the decedent to the PCSI job and could recall the decedent and reassign him at any time. It is also undisputed, however, that PCSI exercised some control over the decedent – PCSI directed the day-to-day activities of the workers at the ITW site.

I note that plaintiff presented evidence that decedent, a foreman and designated contractor safety person at Chaney Creek,¹ carried his Chaney Creek duties over to defendant's work site with regard to the other Chaney Creek employee there. Chaney Creek's owner testified at deposition that decedent's duties on defendant's work site included supervising the other Chaney Creek employee, verifying hours worked at defendant's work site, and handling safety concerns. Chaney Creek's owner also testified that he could pull any of his employees from defendant's work site if he needed them for one of Chaney Creek's projects. Decedent brought his own tools and protective equipment to defendant's work site, and defendant's work rules and dress code were not applied to decedent.

Regarding the right to hire, fire and discipline-factor of the economic realities test, the circuit court concluded:

It is undisputed that PCSI did not have the right to hire and fire Chaney employees. Yet, PCSI did have the right, if it was dissatisfied with a Chaney employee, to have that employee be removed from the job. PCSI also had the right to impose limited discipline. In *Chiles [v Machine Shop, Inc]*, 238 Mich App 462; 606 NW2d 398 (1999)], the Court of Appeals found the employer's right to lay off a loaned employee tantamount to the right to hire, fire and discipline. Likewise, in this case, the Defendant effectively had the right to hire, fire and discipline Plaintiff's decedent because the Defendant could cause him to be removed from the job.

I disagree with the circuit court. Chaney Creek had sole authority to hire, fire and discipline decedent. Chaney Creek alone set decedent's terms of employment and Chaney Creek alone could alter those terms. Chaney Creek's president, Charles Erickson, testified that Chaney Creek was decedent's sole employer. Erickson testified that he had the right to hire, fire, and discipline decedent, and that he assigned decedent and a second Chaney Creek employee to the PCSI site on the day of decedent's death. Erickson determined the hourly rate that PCSI would pay for decedent, \$22 per hour, and he testified that he made a profit of two to four dollars an hour from that figure. Erickson testified that decedent and any other Chaney Creek employee that worked on PCSI job sites remained Erickson's employees throughout. Erickson testified that Chaney Creek was in no way a labor broker, and that Chaney Creek had never provided workers to anyone other than PCSI. Erickson testified that MIOSHA cited and fined Chaney Creek Construction as a result of decedent's accident. Ronald Refitt, Sr., PCSI's president, testified that PCSI was cited and fined as well.

Finally, Refitt testified at deposition:

Q. . . . Would you agree that Chaney Construction has sole responsibility for recruiting, hiring, evaluating, replacing, supervising, discharging, disciplining any workers that they supplied to you.

¹ Chaney Creek had a subcontracting relationship with defendant, under which it would contract some of its employees to defendant on an as-needed basis. On the day of decedent's accident, decedent and another Chaney Creek employee were subcontracted to defendant, and were working with six of defendant's employees on a roofing project.

- A. Yes, unless we told them somebody didn't, wasn't capable of doing what we were doing, or perhaps had an unsafe way of doing things.

Thus, PCSI could only ask that Chaney Creek employees be removed from its work site. The circuit court's finding that such is "tantamount to the right to hire, fire and discipline," is unsupported by the record. *Chiles, supra*, on which the circuit court relied, is distinguishable from the instant case. The plaintiff in *Chiles* was hired by Morbark Industries, Inc. Several years later Morbark Industries split into several separate corporations that included Forestry Products, Inc., and Machine Shop, Inc. The plaintiff became classified as a Forestry Products employee but actually worked for Machine Shop, Inc. Following his injury and after the plaintiff returned to work, he was laid off and notified he would not be rehired. The plaintiff brought suit alleging that his lay off was in retaliation for filing a worker's compensation claim and because he was perceived as suffering from a disability. Before the jury began deliberating, the plaintiff stipulated to dismiss all the defendants except Machine Shop, and defense counsel did not object. Following a jury verdict in the plaintiff's favor, Machine Shop appealed, arguing that it was not the plaintiff's employer at the time that the challenged acts occurred and was not subject to liability under the WDCA. This Court applied the economic reality test and concluded that the plaintiff had been working as a loaned employee when he was laid off, that the defendant directed his activities, and that the defendant had the right to hire, fire and discipline him "because in making the decision to lay off plaintiff and not recall him for over eight months, defendant exercised these rights." *Chiles, supra* at 467-468. This is the language the circuit court in the instant case relied on, improperly, in my opinion, given the differences in the contexts of the two cases.

Another factor of the economic reality test is "performance of duties as an integral part of the employer's business toward the accomplishment of a common goal." The circuit court concluded on this factor:

[I]t is undisputed that the installation of the roofing system was integral to PCSI business of constructing the ITW building addition. Thus, the Plaintiff's decedent performed work that was part of a "common objective integral to [Defendant's] business" and work that would normally follow the usual path of an employee."

Plaintiff argues in this regard that PCSI and Chaney Creek "are not so integrally related that their common objectives were only realized by a combined business effort," citing *Kidder v Miller-Davis Co*, 455 Mich 25; 564 NW2d 872 (1997), a case defendant also cites. Plaintiff notes that PCSI's project at ITW could easily have been completed without decedent and that decedent's duties were not essential. Plaintiff asserts that in *Kidder, supra*, this factor was found in the defendant employer's favor, but that, in contrast to the instant case, that was because there were so many employees from both companies on the work site that it could not easily be discerned who worked for who. Plaintiff maintains that of the eight workers on the site that day, only two were from Chaney Creek, and that PCSI has more than twenty workers in its employ on any given day. Further, plaintiff notes that Chaney Creek's business was not labor brokering and its goal was not to supply workers to the construction trade. Plaintiff argues that PCSI did not retain decedent specifically to install the roofing system, but rather, to fill in where he was needed at any given time. Plaintiff contends that the relationship between Chaney Creek and PCSI does not neatly fall within the definition of a labor broker or subcontractor, or a joint enterprise, and that the relationship was more like the "plain old principal contractor and subcontractor

relationship because of the unique business relationship between” PCSI and Chaney Creek. Plaintiff contends that there is no discernible common goal between the two and that neither company is an integral part of the other.

Defendant PCSI argues that PCSI could not have fulfilled its contractual obligation to ITW, the company for which PCSI was completing an addition and roofing on which decedent was killed, without employing Chaney Creek workers, and that the Chaney Creek workers, including decedent, were working with PCSI workers toward accomplishing PCSI’s project goals. Defendant argues that it is undisputed that the installation of the roofing was integral to PCSI’s business of constructing the ITW building addition, and that therefore, decedent performed work that was part of “a common objective integral to” PCSI’s business.

The plaintiffs in both *Kidder*, and in its companion case, *Wolthuis v Miller-Davis*, were leased to the defendant, Miller-Davis, on construction sites at which Miller-Davis was the general contractor. Both the plaintiffs were employees of a labor broker firm, CLS, which the *Kidder* Court described as “a labor broker in the business of providing ‘leased services of construction trades personnel on an independent contractor basis’ to construction contractors.” 455 Mich at 28. Regarding the economic realities test “common objective” factor the *Kidder* Court stated:

In both cases a common objective or goal was undertaken by both employers. Miller-Davis could not have completed its renovations without employing CLS workers and the CLS workers were working toward completing Miller-Davis’ project goals. In fact, in testimony taken during the Wolthuis trial a person stated that there were so many workers on the site and the duties were so intertwined that it could not readily be determined who worked for CLS and who worked for Miller-Davis. Clearly, the two were “so integrally related that their common objectives [were] only realized by a combined business effort.” *Farrell [v Dearborn Mfg Co]*, 416 Mich 267, 277; 330 NW2d 397 (1982)]. A labor broker-customer relationship may very well presume a common objective. See *Tolbert v U S Truck Co*, 179 Mich App 471, 476; 446 NW2d 484 (1989) (“[a] labor broker relationship established . . . [a] common objective in a business effort”).

In *Farrell* and *Tolbert*, *supra*, as in *Kidder*, *supra*, labor broker relationships were involved. In contrast, in the instant case Chaney Creek is not a labor broker. Defendant asserts, but has not supported, that it could not have completed its contract with ITW absent the help of decedent and another Chaney Creek employee.

Under these circumstances, I cannot agree with the circuit court’s determination regarding this factor.

Regarding the payment of wages factor, PCSI’s president (Reffitt) and Chaney Creek’s president (Erickson) both testified at deposition that Chaney Creek alone paid decedent directly and Chaney Creek alone decided how much to pay its employees, including decedent. Erickson testified that Chaney Creek provided decedent’s worker’s compensation insurance, withheld state and federal taxes, and social security, and provided W-2s. Erickson testified that at no time did PCSI pay any of these for Chaney Creek or pay benefits to Chaney Creek employees. PCSI paid Chaney Creek a flat hourly rate for decedent’s work, \$22 per hour.

The circuit court concluded:

As in *Chiles*, the only factor that arguably does not weigh in favor of the finding of an employment relationship is the payment of wages. It is undisputed that the decedent was paid by and received his W-2 from Chaney. It is also undisputed that PCSI paid Chaney a flat hourly rate which PCSI understood to cover wages, worker's compensation insurance, payroll taxes, and so on. This is the same arrangement PCSI had on other occasions with Manpower and other temporary employment agencies. Yet, the decedent did not receive fringe benefits that were provided by PCSI to its regular employees. However, as in *Chiles*, the Defendant paid the decedent's actual employer, Chaney Creek Construction, for the right to use the decedent's services. Thus, at the time of his death, the Plaintiff's decedent was working for the PCSI as a loaned employee. His actual employer was Chaney Creek Construction, but he had been loaned to and was performing services for PCSI.

CONCLUSION

After analyzing the undisputed facts in this case, the only reasonable inference that can be drawn from the affidavits, depositions and other materials submitted to the Court is that the Plaintiff's decedent was a loaned employee and an employment relationship existed between PCSI and the decedent for WDCA purposes. Because of that employment relationship, the exclusive remedy provision of the WDCA applies to bar Plaintiff's recovery against PCSI. . . .

The evidence presented on the question whether PCSI was decedent's employer was not susceptible to only one reasonable inference. The circuit court improperly relied on *Chiles*, *supra*, and erred in deciding the issue as a matter of law. I would reverse and remand.

/s/ Helene N. White